IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*,

v.

ELMORE & STAHL, *Respondent*.

On Writ of Certiorari to the Supreme Court of Texas

REPLY BRIEF FOR THE PETITIONER

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I. SINCE THE CARRIER HAS SHOWN ITS FREEDOM FROM NEGLIGENCE AND COMPLIANCE WITH THE SHIPPER'S INSTRUCTIONS, IT IS NOT LIABLE FOR THE SPOILAGE AND DECAY OF THE MELONS

A common carrier by rail is not liable for spoilage and decay of an interstate shipment of perishable commodities, when it sustains the burden of showing that it

has exercised due care as to the shipment and has complied with the instructions of the shipper. This is true on three alternative bases, each one of which would suffice to support this result: (1) the Bill of Lading's reference to liability "as at common law"; (2) the Bill's exception for damage resulting from inherent vice; and (3) the express provisions of the Perishable Protective Tariff, incorporated by the Bill.

Respondent's Brief does not refute any one of these three alternative bases.

1. ***In the absence of negligence, the carrier is not liable for spoilage of perishables under the common law as applied under the Bill of Lading.***—(a) We have cited numerous cases (Pet. Br. 12-14) in support of the proposition that, at common law, a carrier who has demonstrated his freedom from fault and compliance with the shipper's instructions is not liable for a spoilage or decay claim with respect to perishables. The leading state court case dealing with an interstate shipment is *Southern Pacific Co.* v. *Itule*, 51 Ariz. 25, 74 P.2d 38 (1937); and a representative Federal Court decision is the very recent Ninth Circuit case of *Larry's Sandwiches, Inc.* v. *Pacific Elec. Ry.*, 318 F.2d 690 (9th Cir. 1963). Respondent admits that these cases are contrary to its position; and despite the laborious distinctions essayed by respondent, the other cases we have cited all support this basic proposition.

This proposition cannot be refuted—as respondent would—by pointing to general statements about "absolute" or "insurer's" liability in cases not involving claims for spoilage to perishables and not discussing

the principles relevant to them.[1] We stand on our original statement (Pet. Br. 15) that we have found no holding, apart from that of the courts below, con-

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[1] Respondent—and the amici Shippers' Associations—frequently describe their cited cases as having to do with fruits and vegetables, while omitting the fact that they are not cases of spoilage or decay. For example, respondent (Res. Br. 10) says that the "insurer rule" has been applied to "onions, to apples, molasses, and most recently, eggs" and that it has been applied "to a shipment of live poultry." But none of the cases cited is a natural deterioration case. The cited cases are (Res. Br. 10): *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104 (1941) (loss of molasses aboard barge which sank); *Chicago & N.W.Ry.* v. *Whitnack Produce Co.*, 258 U.S. 369 (1922) (apples which froze in transit); *Secretary of Agriculture* v. *United States*, 350 U.S. 162 (1956) (breakage of eggs); *Chicago & E.I.R.R.* v. *Collins Produce Co.*, 249 U.S. 186 (1919) (commandeering of live poultry to alleviate famine). Occasionally, cases dealing with breakage or damage to packaging, or cases dealing with improper packaging, are cited by respondent or the Shippers' Associations as if they were spoilage cases. See *Perkel* v. *Pennsylvania R.R.*, 148 Misc. 284, 265 N.Y.S. 597 (1933) (S.A. Br. 12-13); *Commodity Credit Corp.* v. *Norton*, 167 F.2d 161 (3d Cir. 1948); *California Packing Corp.* v. *The Empire State*, 180 F. Supp. 19 (N.D. Cal. 1960) (Res. Br. 10).

Still other cases cited by respondent or the Shippers' Associations are decisions which accept, or apparently accept, the rule which we contend for, but in which the carrier was not found free from negligence, and accordingly was held liable, see *N. H. Nelson & Co.* v. *Chicago & N.W.Ry.*, 102 Neb. 439, 167 N.W. 574 (1918); *Chesapeake & O. Ry.* v. *Timberlake, Currie & Co.*, 147 Va. 304, 137 S.E. 507 (1927); *Chesapeake & O. Ry.* v. *W. C. Crenshaw & Co.*, 147 Va. 290, 137 S.E. 515 (1927) (S.A. Br. 12), or are simply cases having nothing to do with the issue, see *Compania De Vapores Insco* v. *Missouri Pacific R.R.*, 232 F.2d 657 (5th Cir. 1956) (damage to Chrysler automobile); *Lehigh Valley R.R.* v. *Russia*, 21 F.2d 396 (2d Cir. 1927) (sabotage to explosives); *Reider* v. *Thompson*, 116 F. Supp. 279 (E.D. La. 1953) (sheepskins damaged by water from outside source); *United States* v. *Mississippi Valley Barge Line Co.*, 285 F.2d 381 (8th Cir. 1960) (cut auto tire); *Louisiana S. Ry.* v. *Anderson, Clayton & Co.*, 191 F.2d 784 (5th Cir. 1951) (cotton damaged by fire) (all Res. Br. 10); *Akerly* v. *Railway Express*

trary to the proposition that the carrier, upon proof of its freedom from negligence, and compliance with the instructions of the shipper, is exonerated at common law from liability in the case of spoilage or decay of a shipment of perishable commodities. This remarkable consensus[2] eloquently demonstrates the content of the common law rule, applicable under the Bill's provision that the carrier "shall be liable as at common law." (Para. 1(a), R. 158).

(b) As we demonstrated in our opening brief, this established rule as to perishables is founded in the fundamental allocation of responsibility for common carrier shipments established from the early days of common law adjudication; and courts applying the common law applied this rule as soon as long distance shipment of perishable commodities began to be usual. (Pet. Br. 11-14). This rule, then, is in every respect applicable under the Bill of Lading's reference to

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Agency, Inc., 96 N.H. 396, 77 A.2d 856 (1951) (freezing of eggs, a condition which the court expressly distinguished from the application of the special rule as to perishables) (S.A. Br. 13-14). In *Southern Ry.* v. *Bateman Fruit Exchange*, 173 Ga. 826, 162 S.E. 112 (1931), the holding of the court is unclear from its brief "Syllabus Opinion" rendered in response to certified questions. The sentence following the material quoted by the Shippers Associations (S.A. Br. 12-13) suggests that where carrier negligence is negated, a case of "inherent vice" is made out, which accords with our position. See 162 S.E., at 113.

For *Schnell* v. *The Vallescura*, 293 U.S. 296 (1934), the only other case cited against our contentions as to the content of the common law, see note 5, *infra*.

[2] The most recent reported decision following this general principle is *Mirski* v. *Chesapeake & O. Ry.*, 15 CCH Fed. Carriers Cas., para. 81,591 (opinion released December 13, 1963).

liability "as at common law."[3] The common law does not impose an absolute carrier liability against spoilage of perishables.

2. *This case is within the inherent vice exception in the Bill of Lading.*—The Bill of Lading provides, in terms, that absent negligence, the carrier shall not be accountable for loss or damage "resulting from a defect or vice in the property." (Para. 1(b), R. 158). The respondent insists that petitioner has not made out a case of "inherent defect or vice" in the case at bar. (Res. Br. 20-23). It is, however, difficult to ascertain what further showing respondent would exact. The respondent does not seriously suggest that this case is one other than of spoilage and decay—natural deterioration—of a perishable commodity.[4] This is not a

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[3] We have never conceded otherwise—as respondent hopefully suggests (Res. Br. 9, 19)—and in fact our position has been expressly that this rule as to perishables is part of the common law. (Pet. Br. 10, 14).

[4] Both the Texas Supreme Court (R. 243) and the Texas Court of Civil Appeals (R. 231-32) viewed the case as one of a "claim . . . for spoilage and decay" (R. 243), as to which the only issue was the proper legal rule to be applied. We do not understand the respondent to contend that the condition of "Bacterial Soft Rot, generally in advanced stages" which had infested the melons is not a matter of spoilage and decay. (R. 115) The melons, per the inspection, also showed signs of "discoloration." (R. 46) As to the suggestion made in this Court (Res. Br. 21) that the "discoloration" was not a condition of deterioration, spoilage or decay, but a condition associated with bruising, the record is clear that the inspection distinguished between "bruising" and "discoloration," the latter being associated with "decay," as a matter of "condition." (R. 73) Of course, the jury found that the carrier performed the transportation without negligence. (R. 177) The expert testimony as to the meaning of "discoloration" was that it was a surface condition of the melons that would set in on their way to destination markets where the melons had been harvested before the proper time. (R. 114)

case involving theft, fire, loss or disappearance of the shipment, breakage, or the like, which would present altogether different issues.

The point is that where the loss is one of spoilage or decay of perishables, and the carrier demonstrates its freedom from fault and compliance with the shipper's instructions—as the jury found here—there is nothing further which the carrier need show to bring itself within the "inherent vice" exception.[5] See *Trautmann Bros. Co.* v. *Missouri Pac. R.R.*, 312 F.2d 102, 105 (5th Cir. 1962). It is interesting to note that the *amici* Shippers' Associations correctly admit that "the inherent tendency of perishable goods to deteriorate or decay" is an example of "inherent vice." (S.A. Br. 17). Thus, where spoilage occurs, and the carrier shows its freedom from fault and compliance with shipper's instructions, the case is one within the "inherent vice" exception. "[W]here goods are delivered in a damaged condition, plainly caused by . . . decay, their condition brings them within an exception exempting from that character of loss, as the very fact of the nature of the injury shows the damage to be *prima facie* within the

[5] To be sure, Justice Stone in *Schnell* v. *The Vallescura*, 293 U.S. 296 (1934), put the matter in slightly different verbal terms, but without any real distinction. He stated that the decay of a perishable cargo was not in itself an example of "inherent vice"—as the Shippers' Associations take pains to quote (S.A Br. 11-12); but the rest of his opinion makes it plain that, in a spoilage case, once the carrier showed its freedom from negligence, an exception would be available. See 293 U.S., at 304, 305-06. Thus the rule in the *Schnell* case is identical with the rule as to the exception which we contend for; because, as we concede, and under the express terms of the Bill (Para. 1(b), R. 158), the inherent vice exception is only available in the absence of the carrier's negligence; and the jury here found the carrier free of negligence.

exception. . . ." *The Folmina*, 212 U.S. 354, 362 (1909).[6] Proof of compliance with the shipper's instructions and freedom from negligence completes the required showing. "The negation of the one [negligence] establishes the other [the 'inherent vice' exception]." *F. O. Bradley & Sons Ltd.* v. *Federal Steam Navigation Co. Ltd.*, 137 Law Times Rep. 266 (H.L. 1927) (Pet. 53a)—The effort by respondent, and by the Shippers' Associations, to suggest that there is something else that must be shown—it is never concretely and explicitly stated what[7]—is simply an effort at obfuscation of the issues.[8]

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[6] Of course, as respondent points out (Res. Br. 20-22), where the damage involves something other than the deterioration of perishables, a case of "inherent vice" would require other proof. But spoilage of a shipment of perishables is of itself a case to which the inherent vice exception is applicable; and accordingly, the test of the carrier's liability is negligence. Certainly, if the loss were, for example, one of the breaking of machinery, the applicability of the exception could not be made out absent some special sort of proof, because it is not of the nature of machinery that it will break simply with the passage of time.

[7] At one passage (Res. Br. 21-23), respondent suggests that it may be embracing the novel theory that this exception is limited to cases of commodities which have unusual or peculiar tendencies to spoilage or decay—such as vegetables or fruit having peculiar fungus afflictions or botanical conditions. This theory is supported by none of the decided cases, and as we demonstrated in our opening brief, the leading case of *F. O. Bradley & Sons Ltd.* v. *Federal Steam Navigation Co. Ltd.*, 137 Law Times Rep. 266 (H.L. 1927), rejects it, as does the decision of the Fifth Circuit in *Trautmann Bros. Co.* v. *Missouri Pac. R.R.*, 312 F.2d 102 (5th Cir. 1962).

[8] The Shippers' Associations make some point of the fact that the jury failed to find that the worsened condition of the melons was due entirely to "inherent vice" (S.A. Br. 26). But the fact of the matter is that in a case of spoilage and decay, once the jury made the affirmative finding that the carrier was free from negligence and had performed the transportation services as re-

3. ***The terms of the Perishable Protective Tariff confirm that the carrier is not liable for the spoilage or decay of perishables in this case.*** We contend that all three of the relevant provisions in this case—the Bill's reference to the "common law", the "inherent vice" exception in the Bill, and the Perishable Protective Tariff, incorporated by the Bill—lead to the same conclusion. Nevertheless, it is clear that if even one of these provisions effectively provides that there shall be no liability for spoilage and decay of perishables, absent carrier negligence or failure to comply with instructions, the judgment below must be reversed.

Rule 130 of Perishable Protective Tariff No. 17 makes it clear that a carrier furnishing protective services (as was done here) does not "undertake to overcome the inherent tendency of perishable goods to deteriorate or decay but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence." Rule 135 of the Tariff also makes it clear that: "The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper . . ."

In an effort to overcome the plain meaning of these provisions, respondent suggests alternatively (1) that

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quested by the shipper, the submission of this issue and the consideration of it by the jury were simply superfluous. And, as the discussion by respondent seems to confirm (Res. Br. 3), and as we demonstrated in our opening brief (Pp. 5, 20), the failure of the jury to find the affirmative on Special Issue No. 6 does not create any inconsistency with its findings that the carrier was free of negligence and complied with the shipper's instructions and the Bill of Lading (Special Issues Nos. 4 & 5, R. 177). These are the controlling findings.

the Tariff rules "merely elaborate on the exception for damage resulting from a default [sic] or vice in the property . . . and the exception for damage caused by the act or default of the shipper" (as it would construe them); or alternatively, (2) that, despite the fact that they have been in existence over forty years, the rules are void. (Res. Br. 24) This second point appears to be made for the first time in this Court.

(a) Neither branch of this argument is sustainable. Respondent's first contention only proves that the meaning of the "inherent vice" exception and the standard imposed at common law are as we contend they are. For the language of the Tariff is explicit; and the ICC, in approving it, indicated that it deemed it only an expression of the common law. *Perishable Freight Investigation,* 56 I.C.C. 449, 483 (1920).

The Tariff makes it perfectly clear that the carrier has not undertaken an absolute liability "to overcome the inherent tendency of perishable goods to deteriorate or decay." His duty as to the perishables is to carry them in accordance with the shipper's directions, and in a manner free from negligence. The rules' reference is explicit: "the inherent tendency of perishable goods to deteriorate or decay"—not some specific peculiar defect that may exist in a particular shipment of fruits or vegetables. Respondent's contention that the Tariff only reflects the Bill of Lading exceptions is accordingly intelligible only if the "inherent vice" exception has the meaning we contend it has. It is the clear wording of the Tariff that should be taken as illuminating the meaning of the common law and the "inherent vice" exception; it would turn matters upside down to take the respondent's hazy contentions as to

the meaning of the "inherent vice" exception as casting a cloud on the clear and precise language of the Tariff.

(b) Alternatively, apparently recognizing that giving effect to the terms of the Tariff here would mean that the judgment below could not stand, respondent—and the Shippers' Associations—are forced to contend that the Tariff provisions are void as conflicting with the Carmack Amendment. (Res. Br. 7, 24; S.A. Br. 21). This argument fails on two grounds.

(i) The Tariff's language has stood for forty-four years as the considered judgment of the ICC as to the standard imposed by the common law. The language was formulated by the Commission itself, as an expression of the standard of the common law. See 56 I.C.C., at 483. It was first promulgated shortly after the adoption of the Carmack Amendment. As we demonstrated in our opening brief, it has been viewed as controlling by the Courts in numerous cases through the years. Countless shipments of produce have moved under it. It has never before been given any meaning different from that which we contend for. Under these circumstances, it is plain that the Tariff's language amounts to a controlling gloss on the common law—a conclusive proof of the meaning of the law's standard. See *Power Reactor Development Co.* v. *International Union,* 367 U.S. 396, 408 (1961); *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 472-73 (1915); *Unemployment Comm'n* v. *Aragon,* 329 U.S. 143, 153-54 (1946); *Stuart* v. *Laird,* 1 Cranch 299, 309 (1803). Respondent's argument would undo over four decades of history.

(ii) Moreover, even if (contrary to our contentions) the Tariff were deemed to make some modification in

the common-law standard of liability, under the circumstances presented here that would not make it invalid. Shortly after the enactment of the Carmack Amendment, this Court made it clear that it was permissible to vary, by special contract or Tariff provision, the standard imposed by the common law, provided that the alteration did not go to the point of exonerating the carrier from liability for negligence. This Court observed: "The rule of the common law did not limit [the carrier's] liability to loss and damage due to his own negligence or that of his servants. . . . But the rigor of this liability might be modified through any fair, reasonable, and just agreement . . . which did not include exemption against the negligence of the carrier or his servants." *Adams Express Co.* v. *Croninger,* 226 U.S. 491, 509 (1913). And this principle—that modifications of the common law liability which did not purport to exempt the carrier from liability for negligence, were perfectly permissible under the Carmack Amendment—has been reiterated by this Court. *Missouri, K. & T. Ry.* v. *Harriman Bros.,* 227 U.S. 657, 672 (1913).[9] The Protective Tariff here does

[9] At the time of these decisions, §20(11) contained its present express provision that "no contract, receipt, rule, or regulation shall exempt such common carrier . . . from the liability hereby imposed." 226 U.S., at 504. The rationale of permitting a variation of the common law's provision for absolute liability, which did not exempt the carrier from liability for its negligence, is that the irreducible liability imposed by the statute itself is a liability for "any loss, damage, or injury to such property *caused by it.*" (emphasis supplied). *Id.*, at 506; see *Trautmann Bros. Co.* v. *Missouri Pac. R.R.,* 312 F.2d 102, 104 (5th Cir. 1962). Thus a provision which retained the carrier's liability for negligence did not transgress the statute simply because it might exclude an absolute liability. 226 U.S., at 509-10. Thus the Court of Appeals for the Fifth Circuit has held, alternatively, that the standard

not purport to exonerate the carrier from liability based upon its negligence;[10] and in this case, the carrier bore the burden of demonstrating its freedom from negligence.

II. RESPONDENT'S ASSERTION THAT A CARRIER SHOULD BE ABSOLUTELY LIABLE FOR THE SPOILAGE AND DECAY OF PERISHABLES IS WITHOUT FOUNDATION.

1. Respondent apparently suggests that, as a matter of public policy, the law should impose an absolute liability on a common carrier for the spoilage of perishable commodities in the carrier's possession. As we have stated, no court, except those below, has ever im-

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of the Tariff is that of the common law, and that even if it varied the common law standard it would be valid. *Trautmann Bros. Co.* v. *Missouri Pac. R.R., supra,* at 104; *Atlantic C.L. Ry.* v. *Georgia Packing Co.*, 164 F.2d 1 (5th Cir. 1947).

The so-called Cummins Amendments to the statute, c. 176, 38 Stat. 1196 (1915), and c. 301, 39 Stat. 441 (1916), which regulated provisions purporting to limit liability to less than the full value of the goods, retained the reference to "loss, damage, or injury . . . *caused by it.*" (emphasis supplied). They were addressed only to the question of limitation on the liability for "*full actual* loss, damage, or injury" (emphasis supplied), and not to the matter of modifying the standard of liability. See also Uniform Freight Classification No. 4, Rule 1(b), discussed at A.A.R. Br. 15-19, 37-39.

In any event, it is impossible to say that the Tariff reduces the carrier's common law liability, since at common law a carrier had no obligation to furnish a refrigerated environment for the carriage of goods; and the Tariff only defines the terms under which the carrier will undertake this further responsibility.

[10] The tariff under consideration in *Secretary of Agriculture* v. *United States*, 350 U.S. 162 (1956), involved a provision which totally excluded a certain amount of breakage from the carrier's responsibility, without regard to whether there was negligence on the part of the carrier. The tariff was not one which retained the carrier's liability for negligence within the area in which it operated. The case, then, turned on the question whether it could be said that the sort of breakage in question generally was a sort of damage not "caused by" the carrier. See 350 U.S., at 165, 166-67. The Court held that it could not, and accordingly the tariff was set aside.

posed such a liability; and it is foreclosed on three alternative grounds. The authorities we have cited establish that once the shipper has established its prima facie case, if the case is one of spoilage or decay of perishables, the burden is on the railroad to show its freedom from fault and its compliance with the shipper's instructions. Upon a finding that the railroad has carried such a burden, it is exonerated from liability for the spoilage.

The respondent would go further; it would make the railroad absolutely liable for the spoilage and decay, at least absent a showing of a nature which respondent—and the amici Shippers' Associations—never make clear. One thing is clear; in their view, a showing, where the loss is one of spoilage and decay, that the carrier has been free of negligence, and has followed the shipper's instructions, is not sufficient. It is apparent, then, that what respondent is contending for is a rule of absolute liability for spoilage; and the theory of its argument and that of amici Shippers' Associations is a frank contention for such a rule. (Res. Br. 28-34; S. A. Br. 26-34).

Respondent's contention is as ill-founded as a matter of public policy as it is as a matter of law. The effect of its adoption would be obvious. Fruits and vegetables begin the process of deterioration as soon as they are harvested. A shipper could deliver produce to a carrier that, although in good condition at the time of delivery, was close to the commencement of spoilage, and could collect if spoilage in fact occurred in transit. The respondent and the Shippers' Association, in an effort to blur this point, insist that the carrier can inspect at the point of shipment (Res. Br. 30-32; S.A. Br. 30). But the problem is not with the shipment of goods already in a spoiled condition; it is with the

shipment of fruits and vegetables that should be consumed more quickly than shipping them to a far-off destination will permit.[11] This clearly involves matters peculiarly within the knowledge and competence of the fruit and vegetable shippers, and as to which the carrier should not be an insurer. Even if this sort of condition were discernable through intensive tests and inspections by the carrier, the cost would be prohibitive. Moreover, much produce must be picked well before its peak in order to stand shipment to market;[12] and such produce often requires extensive and complicated processing, performed by agents of the shipper.[13] This involves consequences basically within

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[11] Sometimes colloquially called, if intentional, "selling a car of produce to the railroad."

[12] "You couldn't ship honeydew melons if you picked them on the vines when they were ripe." (R. 27) (testimony of witness for respondent).

[13] In order to advance the maturation of the honeydew melons involved in the shipment in question, they were (in the middle of June in Rio Grande City, Texas) shut up by an agent of the shipper in a closed, unrefrigerated railroad car, and gassed with ethylene gas for a period of about four to five hours. During that time, it got very warm inside the car, and, as respondent's agent testified, "that is the way we want it" (R. 27). He said that while "I don't take no temperatures, . . . it could easily go to a hundred degrees or more." (R. 28). After this treatment, the car was iced with 10,000 pounds of ice at Rio Grande City. The next morning, at Harlingen, Texas, the car was re-iced with 7500 pounds; and that evening, at Houston, a further re-icing of 7500 pounds was required. On the next day, in the evening, there was a further re-icing at Lexa, Arkansas, with 6600 pounds; the day after, one in the St. Louis terminal area with 3300 pounds; and the day after that, one at Chicago, with 3400 pounds. Obviously, the high temperatures caused by the artificial heat and gas treatment to the melons required very substantial quantities of ice in the early stages of the move. (R. 91-93).

Even the loading of the melons in the case at bar was the responsibility of the shipper. (R. 157).

the knowledge of the shipper and its agents; and it is another reason supporting the wisdom of the consistent course of common-law decisions in not imposing an absolute liability for spoilage and decay.

2. Moreover, the rule contended for by respondent would make a mockery of the eminently fair and reasonable provisions of the Tariff which permit the shipper to choose between a multitude of different protective services,[14] and provide that "the duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper . . ." Under the plain language of the Tariff, "the carrier answers for his ship [car] and men, the cargo-owner for his cargo" and for the prescription of a means to preserve it. See *F. O. Bradley & Sons Ltd.* v. *Federal Steam Navigation Co. Ltd., supra;* Pet. 52a. Under respondent's rule, the carrier would have no protection in meticulously following the instructions of the shipper who chose the protective service, and by performing its transportation services without negligence. Unless the carrier made some further showing—of a sort which respondent never defines—or unless he demonstrated some specific in which the shipper's instructions were at fault, he would be liable under respondent's theory for spoilage even where he strictly performed the protective

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[14] For example, the shipper here could have ordered a specified percentage of salt to be added to the icings so as to speed up the refrigeration process. (R. 90) There are great variations in the need for refrigeration. See *Perishable Freight Investigation,* 56 I.C.C. 449, 454, 468 (1920). The approach of the Protective Tariff is to leave to the shipper the judgment as to which should be employed with his produce; and to require only that the carrier follow those orders, and carry the goods in a nonnegligent manner.

services which the shipper requested, and demonstrated his freedom from fault. To state such a rule, in the context of perishable commodities, is virtually enough to show its unreasonableness. Small wonder that no common law court has ever previously applied it.

3. Finally, respondent—and the Shippers' Associations—speculating darkly as to a torrent of falsified and omitted records, argue that a standard based simply on the issue of negligence is unworkable and the carrier must be, accordingly, held to an absolute liability for spoilage. But it must be remembered that the carrier must bear the burden of proof as to his freedom from negligence, and as to his performance of the requested services. Circumstances casting doubt on the veracity of the carrier's claim to have met this standard may be given in evidence to the jury. The incompleteness of the carrier's records; the interest of the persons making the records; and the other factors which the respondent and the shippers' associations relate are matters which can hardly escape the jury's attention. And independent Government inspections or inspections by shippers' associations are a normal part of the shipping process, and are readily available to the shipper.[15]

Moreover the instant case is itself a refutation of the pretensions that the shipper is without the means to argue that the carrier's claim of freedom from negli-

[15] The melons were inspected at destination by the Department of Agriculture (R. 173). This inspection was an essential part of the shipper's claim, and moreover, it furnished part of the basis for the shipper's argument concerning the operation of the fans during the course of the journey. See page 17, *infra*. The inspection provides information which could be very useful in refuting a carrier's claim to fault-free transportation. See the Inspection Certificate form reproduced at R. 173.

gence is not well taken. As detailed in respondent's brief, there was testimony which could have been construed as showing improper operation of the car fans during the course of the journey. (Res. Br. 28-29.) The upshot of the matter, however, was that the jury did not draw this inference, but credited the carrier's explanation; it found that the petitioner had met its burden of proving freedom from fault and compliance with the shipper's instructions. Having failed to win its case before the jury, respondent now urges on this Court a rule which would make the carrier's proven freedom from fault and compliance with the shipper's instructions insufficient to avert liability for the spoilage.

Accordingly, the policy grounds suggested by the respondent and the amici Shippers' Associations are not well taken, even if there were reason to examine them in the face of the clear language of the Tariff, the law on the "inherent vice" exception, and the uniform current of adjudication on the standard of liability for the deterioration of perishables.